

Procurement for Experimental Purposes, 10 U.S.C. 2373, the “Stealth Statute”

A tenant activity at the Aviation and Missile Command, Redstone Arsenal, Alabama is tasked with the mission of providing realistic threat battlefield scenarios and environments. This entails building and/ or procuring threat simulators, threat simulations, and if at all possible, actual foreign weapon systems. The latter is much preferred as replicating the threat is most clearly achievable with actual threat systems. At issue is nothing less than future battle survivability for our soldiers. This customer utilizes both classified and unclassified data and this data is essential for operational tests, training, and analyses of U.S. military hardware effectiveness, tactics, techniques, procedures, and doctrine. This customer also supports the development of countermeasures against foreign weapon systems. The acquisition of foreign threat systems is absolutely critical because it provides essential intelligence data necessary to defeat foreign systems that our forces are projected to encounter on tomorrow's battlefields. Procurement for this customer, therefore, requires access to foreign manufacturers that are often unwilling to sell under regular procurement procedures or enter contracts that meet our Federal Acquisition Regulation (FAR) requirements. Complicating matters further is the reality that such foreign manufacturers often are unwilling to provide either cost or pricing data or meet other requirements of 10 U.S.C. 2306a Cost or pricing data: truth in negotiations, which is within Chapter 137 Procurement Generally of said title.

In this climate of critical need coupled with very unusual procurement obstacles, this command has turned to the provisions of 10 USC 2373 as a procurement vehicle.

10 USC 2373 Procurement for experimental purposes

- (a) Authority**.-The Secretary of Defense and the Secretaries of the military departments may each buy ordnance, signal, chemical activity, and aeronautical supplies, including parts and accessories and designs thereof, that the Secretary of Defense or the Secretaries concerned considers necessary for experimental or test purposes in the development of the best supplies that are needed for the national defense.
- (b) Procedures**-Purchases under this section may be made inside or outside the United States and by contract or otherwise. Chapter 137 of this title applies only when such purchases are made in quantity.

Similar provisions to the current statute were enacted in the late 1930s as the Congress, with eyes on the events unfolding in Europe, enacted legislation to purchase equipment and supplies (generally from foreign sources) for experimental and test purposes for those developing services, the Air Corps, Ordnance, Signal Corps and Chemical Warfare Service that developed and used noncommercial equipment and supplies. The "Section 800 Panel" surveyed the DoD regarding use of this authority and recommended that it be consolidated into its current format. In the FY 1994 Defense Authorization Act (Public Law 103-160) the Congress consolidated several service-

unique statutes into the current 10 U.S.C. 2373. A clear reading of this statute would lead one to conclude that the Secretary of Defense and the Secretaries of the military departments may procure items for experimental or test purposes inside or outside the United States by contract or otherwise. Of particular note is the last phrase: "Chapter 137 of this title applies only when such purchases are made in quantity." One would therefore conclude that 10 U.S.C. 2373 may be utilized for a purchase that is not "in quantity" of "ordnance, signal, chemical activity, and aeronautical supplies" for "experimental and test purposes" ... "in the development of the best supplies that are needed for the national defense". Moreover, one would further conclude that if the above prongs are met the resultant contract would be exempt from the requirements of Chapter 137 Procurement Generally of Title 10 U.S. Code. It appears, therefore, that the Congress, in its collective wisdom, custom tailored this statutory provision for highly sensitive, extremely unusual procurements similar to those required by this command's tenant activity. Finally, for procurements that are not "in quantity," it provides relief from the normal requirements for competition, pricing information, and even the FAR contractual format.

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